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No. 93-377

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(Additional Action Listed Inside Front Cover)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

QUESTION PRESENTED

Whether New York can impose supplementary tax and regulatory burdens on wholesale sales of cigarettes to Indian purchasers on Indian reservations, where Congress has pre-empted the field of regulating sales to Indians on reservations by enacting the Indian trader laws (25 U.S.C. §261 *et seq.*)?

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Respondent.

—0—

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

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against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY

The respondents respectfully urge the Court to deny the petition for a writ of certiorari seeking review of the order of the New York Court of Appeals entered on June 10, 1993. The unanimous decision of the Court of Appeals is plainly correct and does not merit review.

The decision below expressly follows this Court's longstanding doctrine that state taxation and regulation of sales to reservation Indians are pre-empted by federal law. *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). The Court of Appeals unanimously ruled that New York's cigarette tax regulations could not be enforced against respondents' wholesale sales of cigarettes to Indians on Indian reservations because the regulations impermissibly imposed burdens in a field where Congress has pre-empted state regulatory authority through its enactment of the Indian trader statutes (25 U.S.C. §§261-264).

The Court of Appeals thoroughly considered this Court's opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). In *Potawatomi* the Court held that sovereign immunity prohibited a state from suing a tribe to collect cigarette taxes on retail sales. Wholesalers were not parties to that case and the pre-emptive effect of the Indian trader laws was not addressed. The Court of Appeals concluded that *Potawatomi* did not alter this Court's controlling pre-emption decision in *Warren Trading Post.*

The writ should be denied because the petition fails to raise a serious question of general importance not already authoritatively settled.

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The references to the parties to the proceeding, to opinions below, to statements of jurisdiction and to applicable statutes, as set forth in the petition for a writ of certiorari received by the respondents on September 7, 1993, are incorporated by reference herein.

STATEMENT OF THE CASE

Respondents Milhelm Attea & Bros., Inc.[1] and Elias H. Attea, Jr. are federally licensed Indian traders in the business of selling cigarettes at wholesale to Indians on various Indian reservations located in New York State.

The petitioners concede that the cigarette tax regulations at issue herein impose burdens upon the respondents' wholesale sales to Indians on Indian reservations. Under the regulations, the respondents are liable for and must collect state cigarette taxes on all sales to their Indian customers except for certain limited quantities determined by the Department of Taxation and Finance [20 NYCRR §335.7(b)(3)][2]. Prior approval of the taxing authority is required for each sale to an Indian on the reservation made without payment of the tax [20 NYCRR §335.7(c)(2)].

The regulations further restrict the quantities of untaxed cigarettes which the respondents may sell to Indians on reservations to quotas determined by the Department of Taxation and Finance [20 NYCRR §335.7(c) and (d)]. The wholesalers are required to collect cigarette taxes from the Indians for sales in excess of the quotas [20 NYCRR §335.6(f)(2)]. The location and quantity of the goods which the wholesaler may sell to Indians on the reservation are further restricted through a coupon rationing system administered by the

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[1] Respondent Milhelm Attea & Bros., Inc. respectfully states that it has no corporate parents, subsidiaries or affiliates. The "also known as" designations in the caption of this case are listed as a result of typographical errors contained in documents issued by or submitted to one or more of the petitioners.

[2] Section 335 of the New York cigarette tax regulations was renumbered Section 336 as of December 19, 1990, without any substantive change. To avoid confusion, the section numbers cited in the Appendix to the Petition are used herein.

Department of Taxation and Finance [20 NYCRR §335.7(d) and (e)]. The regulations also restrict respondents by permitting sales only to certain Indians required to be registered with the state as "registered dealers" [20 NYCRR §335.7(b)(1)]. Wholesalers selling amounts in excess of the state-imposed quotas must collect all applicable taxes from Indian purchasers and are liable for the tax due on such excess amounts.

In December, 1988, the respondents commenced separate actions in the New York State Supreme Court, Albany County, claiming that the regulations, to the extent they impose additional state burdens on the respondents' wholesale sales of cigarettes to Indians on Indian reservations, are pre-empted by the Indian trader statutes (25 U.S.C. §§261 *et seq.*). The trial court granted summary judgment to the respondents (A33-A43)[3] and was affirmed unanimously by the Appellate Division, Third Department (A19-A24).

After the New York Court of Appeals refused to review the initial determination in this case for lack of a substantial constitutional question, this Court granted the state's initial certiorari petition, and entered a summary reconsideration order vacating and remanding the case to the Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (A17-A18)."

[3] Unless otherwise noted, numbers in parenthesis following the letter "A" refer to the Appendix in the petition.

On remand, the Appellate Division reversed itself, despite expressly recognizing that Congress has pre-empted the field of regulating trade with Indians and that the federal pre-emption issue raised in the instant case was not before the Supreme Court in *Potawatomi* (A13-A16).

On June 10, 1993, the New York Court of Appeals reversed the Appellate Division (A3-A12). The Court of Appeals concluded that this Court's reference to wholesalers in *Potawatomi* "did not alter the established rule stated in *Warren Trading Post Company v. Arizona Tax Commission*, (*supra*, 380 U.S. at 690) that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for state laws imposing additional burdens upon them" (A10). The Court of Appeals, upon fully considering *Potawatomi*, stated: ". . . we do not read the Court's suggestions for collection remedies as altering the established law regarding federal pre-emption or validating comprehensive regulation by a state of the relationship between Indian traders and their Indian purchasers" (A11). Further, the Court of Appeals found that the tax regulations imposed "significant" burdens on the wholesalers' trade with Indians (A11).

REASONS FOR DENYING THE WRIT

A. The Court of Appeals followed controlling precedent establishing that Congress has pre-empted the field of regulating trade between Indian traders and Indian purchasers on Indian reservations.

The doctrine of *Warren Trading Post*, that the federal Indian trader laws pre-empt states from imposing tax, regulatory or other burdens on sales to reservation Indians, is a longstanding tenet of federal Indian law. In *Central Machinery*, decided some 15 years after *Warren Trading Post*, the Court reaffirmed that holding and reminded states seeking to tax or regulate such transactions that only Congress could grant relief by repealing or amending the federal Indian trader laws. 448 U.S. at 166. Thus, the instant case does not present an appropriate case for review. It is simply another situation wherein a state seeks to impose tax and regulatory burdens upon a field reserved to federal control.

New York's cigarette tax regulations plainly interfere with the federal regulatory scheme. The regulations comprehensively regulate the wholesale distribution of cigarettes to Indians on reservations. Not only does New York seek to require wholesalers to collect, and their Indian customers to pay, state taxes on all but certain limited quantities of cigarettes sold on the reservation, but the regulations also control the price and quantities of cigarettes sold to Indians, and restrict wholesalers to selling only to particular Indians who must register with the state and only at particular locations on the reservation. The regulations even require tribes to obtain "exemption certificates" from New York. The Court of Appeals found the state regulatory burdens to be "significant" in that, *inter alia*, "they dictate to Indian

traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade" (A11).

The Court of Appeals fully observed past precedent, and its decision was clearly correct. The Court of Appeals carefully distinguished *Moe v. Confederated Salish & Kooteani Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), relied on by petitioners, as cases dealing with *retail sales* to *non-Indians*, transactions not within the scope and pre-emptive effect of the Indian trader laws (A8).

The Court of Appeals also carefully analyzed this Court's opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and distinguished that decision as being based on the doctrine of sovereign immunity, not the pre-emptive effect of the Indian trader statutes (A9). The Court of Appeals noted that *Potawatomi* cited "none of the relevant decisions in this area" (*i.e.* federal pre-emption), and concluded that the petitioners' interpretation of *Potawatomi* is "contrary to the present state of the law on the subject" (A10).

Any other result would have produced confusion. Under *Warren Trading Post* and its progeny, the pre-emption of state laws regarding trade with Indians on reservations is unquestioned. To create exceptions to such a fundamental proposition based on a case such as *Potawatomi*, which does not even mention the Indian trader statutes, federal pre-emption or the controlling cases, would be incongruous and raise questions in other settled areas of federal Indian law.

In *Central Machinery*, this Court stated as follows:

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a "sweep as broad as [their] language". 448 U.S. at 166.

Although Congress has had almost 30 years to change the decision in *Warren Trading Post*, Congress has not chosen to do so. *See Hilton v. South Carolina Public Railways Commn.*, _____ U.S. _____, 112 S.Ct. 560, 564 (1991); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we [the Supreme Court] have done").

In the absence of a conflict with prior decisions of this Court, and since the holdings in *Warren Trading Post* and *Central Machinery* completely dispose of the issues raised herein, the petition should be denied for lack of a substantial federal question. *See, Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952). *See also* Sup. Ct. R. 10.

B. Petitioners misstate the decisions in *Moe, Colville* and *Potawatomi*, attempting to create a conflict where none exists.

There are two independent barriers to the assertion of state regulatory authority over activities being conducted on Indian reservations. The first is the doctrine of federal pre-emption. The second is the doctrine of tribal sovereignty or the right of a tribe to govern itself. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980). As this Court observed in *White Mountain*, "[they] are independent because either

standing alone can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." 448 U.S. at 143.

The instant case turns on federal pre-emption, not the permissible limits of state intrusion on tribal sovereignty. This distinction is critical. Where the activity sought to be regulated by the state is pre-empted by federal law, the bar to state regulation or taxation is absolute. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *see also Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980); *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

However, where the activity is not the subject of a pre-emptive federal regulatory scheme, and the sole consideration is that of safeguarding tribal sovereignty, the imposition of minimal state burdens on the tribe may be permitted where there is a valid state interest. *Moe v. Confederated Salish & Kooteani Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

In an effort to avoid the controlling federal pre-emption decisions, the petitioners attempt to blend and confuse the case law concerning federal pre-emption with the legal authorities pertaining to tribal sovereignty, and combine the independent and distinct wholesale and retail transactions[4]. Petitioners make numerous misleading references throughout the petition to instances where "Indian traders" were subjected to state

[4] The claim at page 18 of the Petition that the holding herein affects "every transaction between an Indian tribe and its supplier" is wrong. The holding is limited to wholesale sales to Indians on reservations. Other transactions including sales off the reservation were not at issue.

regulation. However, in all such cases, the state burdens pertained to retail sales to non-Indians, matters outside the scope of the Indian trader laws. As to those transactions, the vendor's status as an "Indian trader" was irrelevant, and the sole consideration was whether the state's requirements violated tribal sovereignty.

In *Colville* the Court explained *why* the Indian trader statutes did not pre-empt regulation of tribal smokeshop retailers who also happened to be licensed Indian traders:

> The Indian trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate *businesses selling goods to reservation Indians* for cash or exchange, *see Warren Trading Post Company v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), *but no similar intent is evident with respect to sales made by Indians to non-members of the Tribe.* 447 U.S. at 155-56, 100 S.Ct. at 2082. (Emphasis supplied.)

The New York Court of Appeals expressly recognized this important difference (A8). Unlike the "Indian traders" in the *Colville* case, respondents' sales on Indian reservations are made at wholesale solely to reservation Indians and are thus covered by the Indian trader statutes. Hence, the Court of Appeals held that state regulations of such transactions is pre-empted by federal law.

None of the cases cited by the petitioners sanctioned pre-payment of a state tax by an Indian vendor to his wholesale supplier, as suggested at pp. 23-24 of the Petition. In *Moe* the Supreme Court held that "... the state may require the Indian proprietor simply to add the tax to the sales price and thereby aid the state's collection and enforcement thereof." 425 U.S. at 483.

Neither the Supreme Court nor the district court in *Moe* passed on or endorsed the application of the pre-payment provisions of the Montana tax statute as argued by the petitioner. 425 U.S. at 468, n.6. Indeed, the Court's holding expressly stopped short of such a requirement. *Id.* The only "collection requirement" of the Montana law approved by the Court was at the *retail* level.

In *Colville*, the Court held that the Indian retailer could be required to purchase *from the state* a quantity of tax stamps and affix such stamps to individual packages of cigarettes at the time of sale of such cigarettes to non-members of the tribe. 447 U.S. at 159, 100 S.Ct. at 2084. This requirement was completely independent from the wholesale purchase of such cigarettes by the Indian vendor from his supplier.

Indeed, in *Colville*, the Court expressly recognized that the Indian vendors therein were not required to pay state taxes to their supplier:

> Essentially, the [district] court accepted the state's contention that the tax falls upon the first event which may constitutionally be subjected to it. ... Where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. State Tax Commission*, 411 U.S. 164 (1973), the first taxable event is the use, consumption or possession by the non-Indian purchaser. *Colville, supra*, 447 U.S. at 142, fn. 9.

In *Potawatomi*, where federal pre-emption was not at issue, the Supreme Court merely confirmed that limited state regulation of *retail* sales to non-Indians such as permitted in *Moe* and *Colville* is not barred by tribal sovereignty principles:

> Those cases [*Moe* and *Colville*] stand for the proposition that the doctrine of sovereign immunity does not prevent a State from requiring *Indian*

> *retailers* doing business on tribal reservations to *collect* a state-imposed cigarette tax on their sales to non-members of the Tribe. *Potawatomi*, 498 U.S. at 513 (emphasis supplied).

The Court of Appeals extensively discussed the *Potawatomi* case and determined that *Potawatomi* did not change the federal pre-emption principles applicable to the issue presented here. Moreover, the Court of Appeals found, under the facts of this case, that the regulations "imposed significant burdens on the wholesaler," negating any "minimal burdens" argument in any event (A11-A12).

C. New York has alternate remedies, and may also seek appropriate legislation from Congress.

The petitioners contend that the collection of the tax at the wholesale level is necessary to prevent tax evasion by non-Indian retail customers, offering completely speculative and unsubstantiated estimated losses which the petitioners admit were not a part of the record below.

Similar tax evasion arguments were rejected in North Dakota's recent unsuccessful attempt to convince this Court that states may, notwithstanding the Interstate Commerce Clause, impose sales and use taxes on transactions in interstate commerce between out-of-state mail order distributors and retail customers within the state. *Quill Corp. v. North Dakota*, 504 U.S. _____, 112 S.Ct. 1904 (1992).

In any event, petitioners have alternate remedies. The narrow holding in this case does not prevent the petitioners from enacting proper regulations applicable to retail purchases by non-Indian retail customers. The cases relied on by petitioners, *Moe, Confederated Tribes* and *Potawatomi*, all sanctioned minimal state burdens at the retail level.

Also, New York may negotiate tax agreements with Indian tribes. In 1988, New York negotiated such an agreement with the Seneca Nation of Indians, but it was not ratified. Perhaps different terms may be explored.

Finally, if these alternatives are not satisfactory, New York may seek relief from Congress. The Court has consistently refused to intrude upon the Congressional function of balancing interests and imposing burdens among various federal, state, tribal, and private interests in the area of trade with Indians on reservations:

> Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interest is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress. *Washington v. Confederated Tribes of Colville Indian Reservation, supra*, 447 U.S. 134, 177 (1980) (concurring opinion of Rehnquist, *J.*).

Indeed, the various arguments of competitors highlight the inherently political nature of the various interests to be balanced. The proper forum for balancing such considerations is Congress, not this Court.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: October 6, 1993

Respectfully submitted,

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